

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000448-001 DT

12/12/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

JOSE ROLON
SUSAN ROLON

CHELSIE LYNETTE MORRIS

v.

NASRIN NORASETH MATANAGH (001)
SASAN ASADI (001)

NASRIN NORASETH MATANAGH
4823 W 84TH LN
PHOENIX AZ 85037
SASAN ASADI
4823 W 84TH LN
PHOENIX AZ 85037

AGUA FRIA JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2011-015685 RC.

Defendants-Appellants Nasarin Noraseth Matanagh and Sasan Asadi (Defendants) appeal the Agua Fria Justice Court's determination awarding Plaintiffs their attorneys' fees after Plaintiffs prevailed in their contract claim against Defendants. Defendants contend the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On December 19, 2010, Plaintiffs-Appellees Jose and Susan Rolon purchased a used vehicle—a 2002 Mitsubishi Eclipse—from Defendant. Plaintiffs alleged Defendant (1) sold the vehicle in a defective condition—with a bent and cracked radiator and an improperly repaired front frame—without disclosing the defect to Plaintiffs; and (2) the defect resulted in the radiator bursting while Plaintiff Susan Rolon was driving the car. Plaintiffs alleged breach of warranty, false advertising, and breach of contract in their Complaint and requested damages. Their specific requests included (1) punitive damages to the extent permitted by law; (2) general damages including but not limited to pain, suffering, economic hardship and financial losses (past, present, and future) in the amount of three thousand three hundred dollars; (3) costs pursuant to A.R.S. § 12-341; and (4) “for such other relief as this Court deems just and proper.” Plaintiffs also claimed Defendants were dealers and subject to Arizona’s used car “lemon law”.

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Plaintiffs were awarded judgment in their underlying lawsuit. They also requested—and were awarded— \$5,212.25 for attorneys’ fees as part of the judgment. Defendants filed a timely appeal challenging the attorneys’ fee awards claiming Plaintiffs did not specifically request attorneys’ fees in their initial pleading. Plaintiffs filed a responsive memorandum maintaining the attorneys’ fees award was appropriate because (1) they requested costs pursuant to A.R.S. 12–341; (2) fees are allowed under contract law on a statutory basis; (3) fees are allowed pursuant to the Motor Vehicles Warranties Act, A.R.S. § 44–1265(B); and (4) fees are to be awarded for violations of the Consumer Fraud Act. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did Defendants Properly Present Their Issues On Appeal.

Defendants filed their “Appeal Memorandum” on April 23, 2012. Thereafter, on May 16, 2012, Plaintiffs/Appellees filed their Response Memorandum. On May 24, 2012, Defendants filed a “Reply to Response To Appeal Memorandum”. Defendants erred by filing a reply memorandum. Superior Court Rules of Appellate Practice—Civil (SCRAP—Civ) Rule 8(a)(1) states in relevant part:

No reply memorandum shall be filed unless authorized by the Superior Court.

This Court has not authorized a reply memorandum. This Court strikes the reply memorandum.

B. Must A Request For Attorneys’ Fees In A Contract Action Be Specifically Plead.

Standard of Review

Determinations of attorney fees are reviewed for an abuse of discretion and appellate courts will normally not reverse the attorneys’ fee award absent an abuse of that discretion. *Orfaly v. Tucson Symphony Society*, 209 Ariz. 260, 265, ¶ 18, 99 P.3d 1030, 1035, ¶ 18 (Ct. App. 2004). Therefore, an appellate court will normally not substitute its judgment for that of the trial court if there is any reasonable basis to uphold the decision. *Radkowsky v. Provident Life & Acc. Ins. Co.*, 196 Ariz. 110, 113, 993 P.2d 1074, 1077 (Ct. App. 1999). However, where, as here, the issue is (1) the interpretation of Rule 54(g); and (2) whether Plaintiffs were required to specifically plead a request for attorneys’ fees, the question is one of law and therefore subject to *de novo* review. *King v. Titsworth*, 221 Ariz. 597, 598, 212 P.3d 935, 936 (Ct. App. 2009).

Pleading Under Rule 54(g), A.R.C.P.

Defendants’ primary claim is Plaintiffs failed to specifically plead for attorneys’ fees in their complaint and therefore, according to rule 54(g), A.R.C.P., are foreclosed from raising a claim for attorneys’ fees following judgment. In their Complaint, Plaintiffs specifically referenced a claim for costs pursuant to A.R.S. § 12–341 but omitted any reference to attorneys’ fees according to A.R.S. § 12–341.01. Plaintiffs maintained the attorneys’ fees statute is subsumed

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under the costs statute and therefore their pleading complied with the mandates of Rule 54(g). They also asserted the requirement for specific pleading did not apply as their underlying action was a contract action. They argued the strictures of Rule 54 do not apply because there is an exception in the rule where the substantive law governing the action provides for the recovery of such fees as an element of damages. In contrast, Defendants asserted Plaintiff's lack of specific pleading was fatally defective to any later request for attorneys' fees. Defendants' claim posits the language of Rule 54(g) against (1) the standard that Arizona is a notice pleading state and (2) the provision for attorneys' fees in A.R.S. §12-341.01.

Rule 54(g) states:

Attorneys' Fees.

(1) *Claims for Attorneys' Fees.* A claim for attorneys' fees shall be made in the pleadings.

(2) *Time of Determination.* When attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be made after a decision on the merits of the cause. The motion for attorneys' fees shall be filed within 20 days from the clerk's mailing of a decision on the merits of the cause, unless extended by the trial court.

(3) *Method of Establishing Claim.* A motion for attorneys' fees may be supported by affidavit and exhibits or, at the discretion of the court, by testimony. If the motion is contested, opposing parties may respond to the motion, and a hearing may be granted in the discretion of the court. In addition, the court may refer issues relating to the value of services to a special master under Rule 53.

(4) *Scope.* The provisions of subparagraphs (1) through (3) do not apply to claims for fees and expenses as sanctions pursuant to statute or rule, or to causes in which the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

Arizona is a notice pleading state. A.R.C.P. Rule 8(a) states:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third-party claim, shall contain:

1. A short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it.
2. A short and plain statement of the claim showing that the pleader is entitled to relief.

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3. A demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Plaintiffs (1) requested “general damages including, but not limited to pain, suffering, economic hardship and financial losses (past, present and future)” in their complaint as well as “such other relief as this Court deems just and proper” in their Complaint; and (2) argued attorneys’ fees fall under the rubric of “financial losses”.¹ This is a form of notice pleading. Notice pleading, however, does not mean that a party is relieved from the burden of apprising the adverse side of the requests the party makes. In *Best v. Edwards*, 217 Ariz. 497, 504, ¶ 28, 176 P.3d 695, 702, ¶ 28 (Ct. App. 2008) the Court of Appeals held: “While we agree that Arizona allows notice pleading, a complaint still must give sufficient notice of the relief sought.” The adverse party is entitled to have fair notice of the requested relief. Here, Defendants were not given such notice. Plaintiffs requested costs pursuant to A.R.S. § 12–341. They failed to request attorneys’ fees pursuant to A.R.S. § 12–341.01. Although Rule 8(f) A.R.C.P. requires that pleadings “shall be so construed as to do substantial justice” A.R.S. §12–341 is not same as A.R.S. §12–341.01. As stated in *Spanier v. U.S. Fidelity and Guaranty Co.*, 127 Ariz. 589, 598, 623 P.2d 19 (Ct. App. 1980):

We start with the well-settled precept that under Arizona law, the word “costs” does not include attorneys’ fees, and that attorneys’ fees are generally not recoverable in the absence of some contractual or statutory basis for their award.

Because costs are separate and apart from attorneys’ fees, this Court determines Plaintiffs did not properly request attorneys’ fees when they plead for costs.

Plaintiffs did, however, request “other relief” as the Court deems “just and proper”. This, then leaves open the issue if the general request is broad enough to govern where there is no specific request for attorneys’ fees. The Arizona Court of Appeals addressed a similar situation in *King v. Titsworth, id.*, where the defendant failed to request attorneys’ fees in his answer and never moved to amend his pleadings. After the court ruled in the defendant’s favor, he requested attorneys’ fees. Over the plaintiffs’ objections the *Titsworth, id.*, trial court awarded the attorneys’ fees. Although *Titsworth, id.*, can be distinguished because *Titsworth* did not request attorneys’ fees until after he received his judgment—as opposed to Plaintiffs who requested these fees in a motion for summary judgment—the Court of Appeals ruled that (1) a motion is not the same as a pleading for purposes of Rule 54(g); and (2) attorneys’ fees must be specifically plead. The Court of Appeals held:

Rule 54(g) was amended in 1999 and specifically provides that “[a] claim for attorneys; fees *shall be made in the pleadings*” Ariz. R. Civ. P. 54(g)(1) (emphasis added). This is the entirety of the text in Rule 54(g)(1). The State Bar Committee Notes explain that the rule was amended to “clarify that claims for

¹ Appellees’ Response Memorandum at p. 5, ll. 11–14.

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attorneys' fees under A.R.S. § 12-341.01 or other similar grounds must be timely asserted in the pleadings." Ariz. R. Civ. P. 54(g), State Bar Committee Notes. When a claim for attorneys' fees has been made in the pleadings, the court will determine whether fees are warranted after a decision on the merits. Ariz. R. Civ. P. 54(g)(2). The party that previously made a claim for fees in the pleadings must file a motion within twenty days from the clerk's mailing of a decision on the merits. *Id.*

The rules of civil procedure provide clarification as to what constitutes a "pleading" under Rule 54(g)(1). Rule 7(a) defines the following as "pleadings": a complaint, an answer, a counterclaim, a cross-claim, a third-party complaint, a third-party answer, and a reply. Ariz. R. Civ. P. 7(a); *see also* 2 Daniel J. McAuliffe & Shirley J. Wahl, *Arizona Practice Series, Civil Trial Practice* § 3.4 (2d ed. Supp. 2008). Our law is clear that "[a] motion is *not* a pleading within the meaning of [Rule 7(a)]." McAuliffe & Wahl, *supra*, § 3.5 (citing *Mallamo v. Hartman*, 70 Ariz. 294, 297, 219 P.2d 1039, 1041 (1950), *modified on other grounds*, 70 Ariz. 420, 222 P.2d 797 (1950) ("A motion is not a pleading under the Federal Rules of Procedure adopted by this court."); *see Graham v. Goodyear Aerospace Corp.*, 120 Ariz. 275, 277, 585 P.2d 884, 886 (App.1978) ("Rule 7(a), Rules of Civil Procedure, sets forth the pleadings allowed under our civil rules, and neither a motion to dismiss nor a motion for summary judgment is listed therein.")).

King v. Titsworth, id., 221 Ariz. at 598–99, ¶¶ 9–10, 212 P.3d at 936–37 ¶¶ 9–10. The Court of Appeals continued and held the Arizona Supreme Court's use of the words "shall be made in the pleadings" in Rule 54(g) was (1) a clear indication the Supreme Court determined attorneys' fees were not to be awarded unless there was a request in the pleadings; and (2) a request in a motion would not suffice. In so ruling the Court of Appeals commented on the underlying policy for fee-shifting and held that one of the purposes is to promote out-of-court settlements. *Id.*, 221 Ariz. at 600, ¶ 14, 212 P.3d at 938 ¶ 14. The Court of Appeals continued and determined upholding an attorneys' fees award would be tantamount to depriving the adverse party the opportunity to assess the risks and benefits of litigating. Here, Defendants were deprived of the opportunity to fully weigh the risks of proceeding with litigation. The Court of Appeals said:

As explained above, the plain language of Rule 54(g)(1) and the policy underlying our fee-shifting statutes require that a claim for fees be timely made in the pleadings prior to a decision on the merits so as to put the opposing party on notice of the claim. The language of Rule 54(g)(1) would be superfluous if we were to interpret A.R.S. § 12-341.01 as permitting an award of fees that was claimed for the first time in a motion filed after a decision on the merits.

King v. Titsworth, id., 221 Ariz. at 600, ¶ 15, 212 P.3d at 938 ¶ 15.

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Furthermore, Plaintiffs had the opportunity to amend their pleadings. They were aware of their request for attorneys' fees by the time they filed their Motion For Summary Judgment. Pursuant to Rule 15(a), A.R.C.P., pleadings can be freely amended. Yet Plaintiffs disregarded their opportunity to amend their pleadings and failed to comply with the statutory mandates of Rule 54(g). Because Plaintiffs did not amend their pleadings and did not plead for attorneys' fees they failed to comply with the mandates of Rule 54(g). Therefore, the trial court erred in awarding them their fees.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Agua Fria Justice Court erred in awarding Plaintiffs their attorneys' fees.

IT IS THEREFORE ORDERED reversing the judgment of the Agua Fria Justice Court as to the award for attorneys' fees.

IT IS FURTHER ORDERED remanding this matter to the Agua Fria Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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